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Supreme Court, U.S.
FILED

98 1827 FEB 26 1999

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

Beatrice M. Hunt

v.

Andrew M. Hunt

Petition for Writ of Certiorari

To the Supreme Court of the
State of New Hampshire

Beatrice M. Hunt, Petitioner
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33pp

I. QUESTION PRESENTED FOR REVIEW.

The parties, then husband and wife, separated in the Fall of 1993, at about the time this matter commenced with the filing of a domestic violence petition by the petitioner against the respondent. Petitioner withdrew the domestic violence petition as part of a separation agreement under which, inter alia, the petitioner retained primary physical custody of the parties' child, then age 3. Joint legal custody was continued.

About one year later, the respondent initiated divorce proceedings, at the commencement of which he was allowed to remove the child from petitioner's physical custody through issuance of an *ex parte* order, i.e., without notice to the petitioner due solely to the speculative notion that she, as a French citizen, might flee the country with the parties' child if given prior notice and an opportunity to contest the removal.

Following a four (4)-year pretrial period of contentious litigation between the parties, the New Hampshire superior

(trial) court conducted a trial on August 4, 5, 6 and 7, 1997. The trial court entered a Final Decree of Divorce, which, inter alia, awarded sole legal custody of the parties' child to the respondent.

On appeal to the New Hampshire Supreme Court, petitioner presented, inter alia, the following questions for review:

> Whether the trial court abused its discretion by entering a decree awarding sole legal custody to the respondent without making an affirmative and specific finding, supported by substantial evidence, that the child's welfare was in fact jeopardized; and
>
> Whether in the alternative the trial court's decree awarding sole legal custody to the respondent violates the [petitioner]'s freedom of personal choice in matters of family life as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Following receipt of hearing transcripts and review of the petitioner's notice of appeal, by order dated July 8, 1998, the New Hampshire Supreme Court summarily affirmed the final decree of divorce.

On her motion to reconsider to the New Hampshire Supreme Court, petitioner framed the following "most basic and substantial question of law the Court has overlooked" (emphasis in original): "Does a trial court commit plain error if it enters a decree of sole legal custody without having found affirmatively and specifically, on the basis of substantial evidence, that the child's welfare was in fact jeopardized?" (Emphasis in original.)

Relying on a New Hampshire statutory presumption that joint legal custody is in a child's best interest, petitioner averred that "the central proposition upon which the [petitioner] seeks reconsideration could be re-stated as follows: 'Does not the absence of the required finding itself jeopardize the child's welfare, because sole legal custody eliminates an inherent check on the power of a child's guardian that is

intended to safeguard the child?'" (Emphasis in original.)

In light of those questions, and opining that "[t]he effect of the divorce decree's removal of the [petitioner]'s legal custodial rights effectively terminates the [petitioner]'s parental rights, which raises questions of fundamental constitutional importance," petitioner's motion for reconsideration stated the following, here presented as a question for review by this Court:

> [Whether] the trial court's failure to base its award of sole legal custody on an affirmative and specific finding, supported by substantial evidence, that the child's welfare was in fact jeopardized, violates the Due Process Clause of the Fourteenth Amendment.

By order dated October 1, 1998, the New Hampshire Supreme Court denied the petitioner's motion for reconsideration.

II. LIST OF PARTIES.

In addition to the petitioner shown in the caption, the following are parties:

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III. TABLE OF CONTENTS.

I. Question Presented for Review .. 1

II. List of Parties 5

III. Table of Contents 6

IV. Table of Authorities 8

V. Prayer for Relief 10

VI. Citation to Opinion Below . . 10

VII. Jurisdiction 10

VIII. Statutes, Acts of Congress and Constitutional Provisions Involved 11

IX. Statement of the Case 13

X. Reasons for Granting the Writ of Certiorari 15

A. The writ of certiorari should be granted because a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, being whether the Due Process Clause of the Fourteenth Amendment requires, in a decree awarding sole legal custody of a child to one parent, an affirmative and specific finding, supported by

substantial evidence, that the child's welfare would in fact otherwise be jeopardized, given that such a decree effectively terminates one parent's interest in and freedom of personal choice in matters of family life by removing her check on the other parent's power over their child.
. 15

XI. Conclusion. 26

XII. Appendix. 27

A. Rockingham County Superior Court Final Decree of Divorce dated October 21, 1997 [excerpt]
. 28

B. State of New Hampshire Supreme Court Order dated July 8, 1998
. 32

C. State of New Hampshire Supreme Court Order dated October 1, 1998
. 33

IV. TABLE OF AUTHORITIES.

Carey v. Population Services Inter., 431 U.S. 678, 97 S.~~Ct.~~ 2010 (1977) . 23

Chandler v. Bishop, 142 N.H. 404, 702 A.2d 813 (1997) 20, 21

M.L.B. v. S.L.J., ___ U.S. ___, 117 S.Ct. 555 (1996) 18-19

Pittsley v. Warish, 927 F.2d 3 (1st Cir.), reh. den., cert. den. 112 S.Ct. 226 (1991) . . . 17

Prince v. Massachusetts, 321 U.S. 158 (1944) 17

Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549 (1978) 17

Reno v. Flores, 507 U.S. 307, 113 S.Ct. 1439 (1993) 21-22

Sanborn v. Sanborn, 123 N.H. 740, 465 A.2d 888 (1983) 20

Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982) 23-24

Washington v. Glucksberg, ___ U.S. ___, 117 S.Ct. 2258 (1997) 19

Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1977) 22

OTHER AUTHORITIES

Amendment XIV, § 1, United States Constitution 2, 4, 6, 15, 17, 18, 19, 23, 25

New Hampshire Revised Statutes Annotated 458:17 (1992) 12, 24

V. PRAYER FOR RELIEF.

Petitioner, Beatrice M. Hunt, through counsel, prays that a Writ of Certiorari be issued to the New Hampshire Supreme Court to review the affirmance of the decree of final divorce issued by the Rockingham County Superior Court. Said order was affirmed by an order of the New Hampshire Supreme Court dated October 1, 1998.

VI. CITATION TO OPINION BELOW.

The order of the New Hampshire Supreme Court affirming the decree of final divorce is unpublished.

VII. JURISDICTION.

The judgment of the New Hampshire Supreme Court was entered on October 1, 1998. It affirmed a Final Decree of Divorce issued by the Rockingham County Superior Court by judgment entered on October 21, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

VIII. STATUTES, ACTS OF CONGRESS AND CONSTITUTIONAL PROVISIONS INVOLVED.

A. Amendment XIV, § 1, United States Constitution.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. New Hampshire Revised Statutes Annotated (1992) RSA 458:17.[1]

II. [I]n the making of any order relative to [a child's] custody, there shall be a presumption, affecting the burden of proof, that joint legal custody is in the best interest of minor children:

> **(b)** Upon the application of either parent for joint legal custody, in which case it may be awarded in the discretion of the court. ... If the court declines to enter an order awarding joint legal custody, the court shall state in its order the reasons for denial of an award of joint legal custody.

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[1] [in relevant part]

IX. STATEMENT OF THE CASE.

A central recurring issue of contention between the parties has been that of the immunization of their child, as required, with statutory exceptions, by State law. The parties had agreed to exercise their prerogative not to immunize while their family was intact, but during the divorce proceedings the respondent decided upon and sought temporary sole legal custody purportedly so that he would have the authority to carry out immunization. The trial court twice decreed, in one instance after a day-long evidentiary hearing including expert medical testimony, that such use of sole legal custody would be inappropriate, and that sole legal custody should be granted, if at all, upon grounds independent of immunization, given the fundamental parental interests involved. However, at trial, the presiding judge (a marital master[2]), who

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[2] (New Hampshire uses a system whereby a marital master conducts hearings and trials on most marital matters. The masters' recommendations are then routinely approved by a presiding superior court justice who performs no independent fact-finding function. The system does not provide

acknowledged his complete lack of familiarity with the prior proceedings and refused the petitioner's request to present competent medical evidence on the issue of immunization, relied instead on the fact that his own sister had died of polio, and expressed an urgent desire that sole legal custody should be given to the respondent immediately, and in the form of a temporary decree pending appeal so as to defeat any delay in immunization.

The decree of sole legal custody followed, based solely on the fact that, since sole physical custody was transferred from the petitioner to the respondent, the petitioner had foregone visitation with the child, out of her expressed fear that the child's safety would be jeopardized by potential retaliation by the respondent, due to such visitation.

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parties an opportunity to challenge such recommendations before they are approved by a presiding justice.)

X. REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A. The writ of certiorari should be granted because a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, being whether the Due Process Clause of the Fourteenth Amendment requires, in a decree awarding sole legal custody of a child to one parent, an affirmative and specific finding, supported by substantial evidence, that the child's welfare would in fact otherwise be jeopardized, given that such a decree effectively terminates one parent's interest in and freedom of personal choice in matters of family life by removing her check on the other parent's power over their child.

The trial court set forth its basis for decreeing sole legal custody --

petitioner's lack of visitation with the child -- without any accompanying finding that continuing joint legal custody under that circumstance would in fact jeopardize the child's welfare.[3] Petitioner seeks review narrowly based on the lack of any finding that joint legal custody would in fact jeopardize the child's welfare, arguing that the requirement for such a finding is of constitutional importance. Petitioner does not ask the Court to examine whether the trial court's stated purported factual basis for decreeing sole legal custody could never, in the context of a particular case, constitute substantial evidence sufficient to support the required factual finding. Letting stand a decree that lacks any articulated connection of facts to the constitutionally required finding, however, effectively denies the losing parent any later opportunity either for review or modificatcn of the decree by demonstrating a removal of the danger to the child.

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[3] The Final Decree of Divorce, which is excerpted in the appendix, incorporates certain of respondent's requests for findings of fact and rulings of law. Respondent's requests are not included in the appendix, because they contain no proposed findings regarding legal custody.

This Court has held, "[I]t is now firmly established that 'freedom of personal choice in the matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 555 (1978) (citation omitted); see also Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (Citation omitted.)).

The effect of the divorce decree's removal of the petitioner's legal custodial rights effectively terminates her parental right to exercise her freedom of personal choice in matters of family life, thereby raising questions of fundamental constitutional significance.

The decree of sole legal custody constitutes state action directly aimed at the parent-child relationship, thereby implicating the petitioner's right to familial associational privacy. See Pittsley v. Warish, 927 F.2d 3, 8 (1st

Cir.), reh. den., cert. den. 112 S.Ct. 226 (1991). There is no right accorded more importance under the United States Constitution:

> Choices about marriage, family life, and the upbringing of children are among the associational interests this Court has ranked as "of basic importance in our society," . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.
>
> . . .
>
> [I]t [is] "plain … that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest," one that undeniably warrants deference and, absent a powerful countervailing interest, protection.'" . . . The object of the proceeding is "not simply to infringe upon the parent's interest, . . . but to end it"; thus, a decision against the parent "works a unique kind of deprivation." . . . For that reason, "a parent's interest in the accuracy

and justice of the decision … is … a commanding one."

M.L.B. v. S.L.J., ___ U.S. ___, ___-___, 117 S.Ct. 555, 564-65 (1996) (citations and brackets omitted). The Court noted it "was unanimously of the view that 'the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment . . . [and] that 'few consequences of judicial action are so grave as the severance of natural family ties.'" Id. at 565 (citations and brackets omitted). See also Washington v. Glucksberg, ___ U.S. ___, ___, 117 S.Ct. 2258, 2267 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children . . ." (Citations omitted)).

The New Hampshire Supreme Court elucidated these important Federal constitutional precepts when confronting legal custody issues in the context of conflicting preferences between parents

for religions in both Sanborn v. Sanborn, 123 N.H. 740, 746, 465 A.2d 888 (1983) and Chandler v. Bishop, 142 N.H. 404, 702 A.2d 813 (1997). "Although some States vest legal custodians with the exclusive right to choose the religion of the child, ... many States refuse to restrict the visitation rights of non-custodial parents absent a showing of harm to the child from exposure to a different religious environment. ... New Hampshire falls into this latter category." Chandler, 142 N.H. at 412-413, 702 A.2d at 818 (citing Sanborn, 123 N.H. at 749, 465 A.2d at 894) (other citations omitted)).

"It is axiomatic . . . that the trial courts of this State . . . are bound by the strictures of the Federal Constitution, and that violation of its precepts constitutes the most basic form of abuse of discretion." Sanborn, 123 N.H. at 747, 465 A.2d at 893. Any portion of a custody order will be unconstitutional under the establishment clause if its "primary effect is to advance [one parent]'s religion while inhibiting that of the [other]." Id., 123 N.H. at 749, 465 A.2d at 894. Thus

that court established for the State of New Hampshire a constitutional standard for vesting sole legal custody in one parent that petitioner here seeks to affirm as a Federal Constitutional standard:

> Such an infringement upon [one parent]'s constitutional right would have to be based upon an affirmative and specific finding, supported by substantial evidence, that the children's welfare was in fact jeopardized.

Id. (citation omitted) (emphasis in original).

In resolving such a conflict involving a fundamental constitutional interest, the Court "seek[s] the path of least intrusion on the ... inclinations of parents that is compatible with their children's welfare." Chandler, 142 N.H. at 413, 702 A.2d at 818 (emphasis added, citation omitted). But see Reno v. Flores, 507 U.S. 307, 303-304, 113 S.Ct. 1439, 1448 (1993) ("'The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making

the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion -- much less the sole constitutional criterion -- for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. . . . Similarly, 'the best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated . . . to the interests of the parents or guardians themselves." (Citations omitted).)

Of no less fundamental importance than religious preference is the constitutional right the petitioner invokes: the right to privacy encompassing "the individual ... interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876 (1977). "While the outer limits of this aspect of privacy have not been marked by this Court, it is clear that among the decisions that an individual may make

without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships and child rearing and education.'" Carey v. Population Services Inter., 431 U.S. 678, 684-85, 97 S.Ct. 2010, 2016 (1977) (emphasis added, citations omitted).

In Santosky v. Kramer, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403 (1982), this Court held that New York's use of a "fair preponderance of the evidence" standard in termination of parental rights proceedings "violates the Due Process Clause of the Fourteenth Amendment." Id., 455 U.S. at 769, 102 S.Ct. at 1402 (footnote omitted). The Court then had to decide "whether a 'beyond a reasonable doubt' or a 'clear-and-convincing evidence' standard is constitutionally mandated." Id. In requiring only the lesser burden of proof, the Court essentially based its opinion on "the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all state-initiated parental rights termination hearings." Id., at 770, 102 S.Ct. 1403. However, none of the multitude of potential evidentiary

problems noted by the Court, see id., arise in a parent-initiated effort to terminate the opposing parent's legal custodial rights during a divorce proceeding.

New Hampshire's statutory "presumption, affecting the burden of proof, that joint legal custody is in the best interest of minor children," RSA 458:17, II (1992), demonstrates that legislature's recognition that legal custody of a child implicates fundamental constitutional rights and that joint legal custody protects those fundamental guarantees against unwarranted deprivation.

The very absence of the required finding of danger in fact itself jeopardizes the child's welfare, in that sole legal custody removes an inherent check on the power of a child's guardian intended to safeguard the child. More significantly, the decree's lack of any finding of danger in fact effectively denies the petitioner the opportunity for later review or modification of the decree, because she cannot demonstrate removal of a danger to the child that is

nowhere articulated on the record -- thus there has been a *de facto* permanent termination of the petitioner's parental rights, or the effective equivalent thereof.

The Due Process Clause is violated by allowing a decree of sole legal custody to stand despite the absence of a specific factual basis for a finding of potential harm to the child, because it allows such a decree and its accompanying profound shift in the family relationship to be based on one or more un-stated improper bases, such as that which may be inferred from the record here, to wit, the court's intent, driven by the judge's individualized beliefs, to accomplish immunization, contrary to sincere conscientious beliefs held by the petitioner.

Therefore, the State court's failure to base its award of sole legal custody to the respondent on an affirmative and specific finding, supported by substantial evidence, that the child's welfare was in fact jeopardized, violates the Due Process Clause of the Fourteenth Amendment.

XII. Conclusion

WHEREFORE, Petitioner respectfully requests this Court issue a Writ of Certiorari to the New Hampshire Supreme Court to review its decision of October 1, 1998.

Respectfully submitted,
BEATRICE M. HUNT

By: _____ _____

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

Beatrice M. Hunt

v.

Andrew M. Hunt

XII. APPENDIX TO

Petition for Writ of Certiorari

To the Supreme Court of the
State of New Hampshire

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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

Andrew M. Hunt

v.

Beatrice Juvanon DuVachat Hunt

No. 94-M-1624

FINAL DECREE OF DIVORCE

Master recommends:

A contested hearing on the merits in this case commenced on August 4, 1997, and concluded on August 7, 1997. The Plaintiff appeared with counsel and the Defendant appeared Pro Se, her last attorney having withdrawn on April 8, 1997. The minor child was represented by a Guardian Ad Litem.

The Defendant is originally from France and the parties met in the State of Rhode Island in 1983. The Defendant at that time was a French teacher. the parties were

married in Plaistow, New Hampshire, on July 30, 1985, in a civil ceremony. A later religious ceremony was held in Paris on August 24, 1985.

The Plaintiff is a great grandson of Captain Alfred E. Hunt who was a co-founder of a company which later became known as ALCOA. The Plaintiff is a beneficiary of several trusts worth several million dollars and his total assets including the corpus of the several trusts now total approximately $34,000,000, an increase of approximately $14,000,000, since the date of the filing of the within libel on September 23, 1994.

The Defendant is the daughter of a university professor and is well-educated, having matriculated at the Sorbonne in France. She is fluent in several languages.

One child, a son Edward (d.o.b. 12/24/89) was born of the marriage. Edward remained in his mother's custody from the time of the parties' separation on October

11, 1993, until September 23, 1994, when Edward's physical custody was awarded to his father by ex-parte temporary orders. At that time the boy was 4 and 1/2 years of age, was still using a pacifier (exhibit 4) and had not been potty-trained. He remains unvaccinated to this date. The Defendant has had no contact with Edward for the past three years.

The evidence indicates that the Defendant has joined the Marion Order of Priests and spends considerable periods of time each day at church, in prayer. She does not believe in traditional medicine. She is an advocate of homeopathy and had spent some time studying the same at Northeastern University prior to the birth of Edward. ...

...

Based upon the evidence, the following orders are entered:

1. Decree of divorce. Grounds: irreconcilable differences which have caused the irremediable breakdown of the marriage.

2. Sole legal custody of the parties' minor child Edward (d.o.b. 12/24/89) is awarded to the Plaintiff. The award of sole legal custody is justified based on the fact that the Defendant has not chosen to visit with the minor child for three years.

...

18. ...

The provisions of paragraph 2 of this decree relative to sole legal custody shall take effect immediately as a temporary order and shall remain in effect as a temporary order pending this decree becoming final.

...

October 12, 1997
DATE

[signature]
Peter J. Bourque, Master

October 21, 1997
DATE

[signature:]
Walter L. Murphy
Presiding Justice

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 97-915, Andrew M. Hunt v. Beatrice M. Hunt, the court upon July 8, 1998, made the following order:

The court having reviewed the notice of appeal and appendix, the decision below is summarily affirmed in accordance with Rule 25(1)(A) on the basis that no substantial question of law is presented by the appeal, and the court does not disagree with the result below. Plaintiff's motions for summary affirmance and defendant's motion for summary reversal are, therefore, moot.

...

Howard J. Zibel,
Clerk

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 97-915, Andrew M. Hunt v. Beatrice M. Hunt, the court upon October 1, 1998, made the following order:

Defendant's motion for reconsideration is denied.

Broderick, J., did not participate.

...

Howard J. Zibel,
Clerk